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ERWIN CHEMERINSKY*

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INTRODUCTION

The focus of this conference is on the legacy of *Brown v. Board of Education*,[1] as it approaches its fiftieth anniversary, and of *San Antonio Indep. School Dist. v. Rodriguez*,[2] exactly thirty years after being decided. The simple and tragic reality is that American public education is separate and unequal.[3] Schools are more segregated today than they have been for decades, and segregation is rapidly increasing. Most notably, wide disparities exist in funding for schools. In *Brown*, Chief Justice Earl Warren spoke eloquently of the importance of education and how separate can never be equal.[4] A half century later, in an

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1. 347 U.S. 483 (1954).

2. 411 U.S. 1 (1973).

3. *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 2 (2001), *available at* www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (explaining that segregation is increasing within America's public schools as a result of several Supreme Court decisions limiting the reach of previous desegregation orders).

4. In Chief Justice Warren's speech, he stressed the importance of education, as evidenced by the fact that we have large expenditures for education as well as compulsory school attendance laws. In our society, education is the basis for creating good citizens and preparing them to function well in their environment. Chief Justice Warren stated that it was "doubtful that any child may reasonably be expected

even more technologically complex society, education carries an even greater importance.

The causes for this tragedy are easy to recite. There has never been the political will to pursue equal educational opportunity. Since the 1960s, no president has devoted any attention to decreasing segregation or to equalizing school funding. In *Milliken v. Bradley*,[5] the Supreme Court refused to allow the necessary steps for dealing with unequal educational opportunities by holding that metropolitan school districts can be created as a remedy only in very limited circumstances, and that disparities in school funding do not violate the Constitution.[6] Moreover, Supreme Court decisions in the 1990s required the lifting of successful desegregation orders, causing the resegregation of schools.[7]

In this Essay, I want to look behind these explanations and argue that the central problem in achieving equal educational opportunity has been the lack of a unitary system of education. Desegregation and adequate, let alone equal, funding for schools will not occur in most cities as long as parents have the ability to move their children to suburban or private schools, where far more funds are allocated to education than in inner cities. A crucial aspect of *Brown's* wisdom was the importance of a unitary system of education. Minority children are far more likely to receive quality education when their schooling is tied to wealthy white children. The failure to create truly unitary systems is the core explanation for the inequalities in American schools today.

Consider a simple analogy to today's dual system of medical care for the rich and poor. If wealthy people had to receive their medical treatment in public hospitals, is there any doubt that their quality would be dramatically different? As long as the public hospital system is just for poor people, often predominately racial minorities, the public hospitals will never be the same quality as top private hospitals. The same is equally true of the school system.

Therefore, in this Essay, I propose a radical solution: the complete abolition of private and parochial schools in the United States and the creation of large metropolitan school districts. Under this proposal, every child will be required to attend these public schools.

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to succeed in life if he is denied the opportunity of an education." *Brown*, 347 U.S. at 493.

5. 418 U.S. 717 (1974).

6. *See id.* (stating that metropolitan school districts require proof that a constitutional violation in one district creates a "significant segregative effect" in another).

7. *See infra* text accompanying notes 24-35.

As a result, equality of school funding and meaningful desegregation, as well as a unitary system of education will occur. Desegregation and equalization of funding can be achieved through this approach, whereas any other approach is unlikely to succeed.

I do not pretend that this is likely to happen. The rich and powerful will perceive that they have far too much to lose if they cannot send their children to private and parochial schools or to separate, wealthy public school systems. A Supreme Court that is untroubled by the current unequal educational system is not about to find a compelling interest in eliminating separate schools. But at the very least, I suggest that the goal should be to maximize the creation of a unitary system of education. With this goal in mind, reforms such as school vouchers are moves in the wrong direction because these reforms allow parents to opt out of public schools, and further frustrate the goal of a unitary system.

Part I of this Essay describes the current separate and unequal schools. Part II argues that this is a result of the lack of a unitary system. Finally, Part III offers my radical proposal to require every child to attend a metropolitan public school.

I. SEPARATE AND UNEQUAL SCHOOLS

A recent study by Harvard Professor Gary Orfield,[8] carefully documents that over the 1990s, America's public schools have become substantially more segregated.[9] In the South, for example, he shows that while it is more integrated currently than prior to the civil rights movement, the state of integration is currently "moving backward at an accelerating rate."[10]

The statistics presented in Professor Orfield's study are stark. For example, the percentage of African-American students attending majority white schools has steadily decreased since 1986.[11] In 1954, at the time of *Brown*, only 0.001% of African-American students in the South attended majority white schools.[12] In 1964, a decade after *Brown*, it was just 2.3%.[13] From 1964 to 1986, there was significant progress: from 13.9% in 1967, to 23.4% in 1968, to 37.6% in 1976, to 42.9% in 1986, to 43.5% in 1988.[14] However, since 1988 the

8. Orfield, *supra* note 3, at 2.
9. *Id.*
10. *See id.* (showing that most of the progress achieved in integration from 1968 through 1988 was lost during the period between 1988 and 1998).
11. *Id.* at 29.
12. *Id.*
13. *Id.*
14. *Id.*

percentage of African-American students attending majority white schools has experienced continuous decreases. By 1991, the percentage of black students attending majority white schools in the South decreased to 39.2% and over the course of the 1990s it went to 36.6% in 1994, to 34.7% in 1996, to 32.7% in 1998.[15]

Professor Orfield shows that nationally the percentage of African-American students attending majority black schools and schools where over ninety percent of the students are black also increased in the last fifteen years. In 1986, 62.9% of black students attended schools with between fifty and one hundred percent minority student bodies, and by 1998-99 the number had increased to 70.2%.[16]

In North Carolina, for example, the same pattern exists. Between 1993 and 2000, the number of black students attending schools with minority enrollments of eighty percent or more doubled.[17] In Charlotte, fewer than sixty percent of the schools meet the standard definition of "diverse";[18] this is down from eighty-five percent in the 1980s.[19]

Quite significantly, Professor Orfield shows that the same is true for Latino students. The historic focus for desegregation efforts has been to integrate African-American and white students. The burgeoning Latino population requires that desegregation focus on this racial minority as well. The percentage of Latino students attending schools where the majority of students are minority races, or almost exclusively of minority races, increased steadily over the 1990s.[20] Professor Orfield notes that "[Latinos] have been more segregated than blacks for a number of years, not only by race and ethnicity but also by poverty."[21]

There is every reason to believe that the problem is going to get worse. Supreme Court decisions ending successful desegregation orders are causing substantial increases in segregation.[22] In several cases, the Supreme Court concluded that school systems achieved "unitary" status, and therefore that federal court desegregation efforts should end.[23] The result was that remedies, which were in

15. *Id.*
16. *Id.* at 31.
17. Susan Ebbs, *Separate and Unequal Again*, THE NEWS & OBSERVER, Feb. 18, 2001, at A1.
18. *Id.*
19. *Id.*
20. Orfield, *supra* note 3, at 31.
21. *Id.* at 2.
22. *Id.* at 16.
23. *See id.* at 58 (citing Bd. of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) and Freeman v. Pitts, 503 U.S. 467 (1992)).

place and working, ceased and resegregation resulted. Many lower courts followed the lead of the Supreme Court and ended desegregation orders. The result has been a predictable increase in segregation as documented by Orfield.

In several recent cases, the Supreme Court considered whether a federal court desegregation order should end. In *Board of Education of Oklahoma City v. Dowell*,[24] the issue was whether a desegregation order should continue when its end would mean a resegregation of the public schools. Oklahoma schools had been segregated under a state law mandating separation of the races. It was not until 1971, seventeen years after *Brown*, that desegregation was ordered. A federal court order successfully desegregated the Oklahoma City public schools. Evidence proved that ending the desegregation order would result in dramatic resegregation. Nonetheless, the Supreme Court held that once a "unitary" school system had been achieved, a federal court's desegregation order should end even if it means resegregation of the schools.[25]

The Court did not define "unitary system" with any specificity. The Court simply stated that the desegregation decree should end if the board "has complied in good faith" and "the vestiges of past discrimination have been eliminated to the extent practicable."[26] The Court stated that in evaluating the factors "the District Court should look not only at student assignments, but to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities."[27]

In *Freeman v. Pitts*,[28] the Supreme Court similarly held that a federal court desegregation order should end when it is complied with; even if other desegregation orders for the same school system remain in place. A federal district court ordered desegregation of various aspects of a school system in Georgia previously segregated by law. The school system achieved part of the desegregation plan by desegregating pupil assignments and facilities. The aspect of the desegregation order concerning assignment of teachers, however, had not yet been fulfilled. The school system planned to construct a facility that would benefit whites more than blacks. Nonetheless, the Supreme Court held that the federal court could not review the discriminatory effects of the new construction because part of the

24. 498 U.S. 237 (1991).
25. *Id.*
26. *Id.* at 249-50.
27. *Id.* at 250.
28. 503 U.S. 467 (1992).

desegregation order concerning facilities had already been met. The Court said that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and remain involved only as to those aspects of the plan that have not been achieved.[29]

Finally, in *Missouri v. Jenkins*,[30] the Court ordered an end to a school desegregation order for Kansas City schools.[31] Missouri law originally required the racial segregation of all public schools. It was not until 1977 that a federal district court ordered the desegregation of the Kansas City, Missouri, public schools. The federal court's desegregation effort made a difference. In 1983, twenty-four schools in the district maintained African-American enrollment of ninety percent or more. However, by 1993, no elementary-level student attended a school with an enrollment that was ninety percent or more African-American. At the middle school and high school levels, the percentage of students attending schools with an African-American enrollment of ninety percent or more declined from about forty-five percent to twenty-two percent.

The Court, in an opinion by Chief Justice Rehnquist, ruled in favor of the state on every issue. First, the Court ruled that the district court's order that attempted to attract non-minority students from outside the district was impermissible because there was no proof of an interdistrict violation.[32] The social reality of the situation is that many city school systems are now primarily composed of minority students, while surrounding suburban school districts are almost all white. Effective desegregation requires an interdistrict remedy, which the lower court attempted to apply. Chief Justice Rehnquist, however, applied *Milliken* to conclude that the interdistrict remedy was impermissible because there only was proof of an intradistrict violation.[33]

Second, the Court ruled that the district court lacked authority to order an increase in teacher salaries. Although the district court believed that an across-the-board salary increase to attract teachers

29. *Id.* at 491.
30. 515 U.S. 70 (1995).
31. *Id.* Earlier in Missouri v. Jenkins, 495 U.S. 33 (1990), the Supreme Court ruled that a federal district court could order that a local taxing body increase taxes to pay for compliance with a desegregation order, although the federal court should not itself order an increase in the taxes. *Id.*
32. *Jenkins*, 515 U.S. at 70.
33. *See id.* at 71-72 (finding that the interdistrict remedy involved incentives to attract students from outside the district into the Kansas City schools).

was essential for desegregation, the Supreme Court concluded that it was not necessary as a remedy.[34]

Finally, the Court ruled that the continued disparity in student test scores did not justify continuance of the federal court's desegregation order. The Court concluded that because the Constitution requires equal opportunity and not equal result, any disparities between African-American and white students on standardized tests was an insufficient basis for determining that desegregation had not been achieved. The Supreme Court held that once a desegregation order is complied with, the federal court effort should be ended, as disparity in test scores is not a basis for continued federal court involvement.[35]

The three cases together give a clear signal to lower courts: the time has come to end desegregation orders, even when the effect will be resegregation. Lower courts have followed this lead. The United States Court of Appeals for the Fourth Circuit ended the desegregation remedy for the Charlotte-Mecklenburg schools.[36] The Eleventh Circuit rejected the District Court's conclusion that unitary status had not been reached.[37] Notwithstanding the Eleventh Circuit's conclusion that a desegregation order was no longer necessary, evidence indicates that Latino students outnumber whites and blacks combined at thirteen Hillsborough schools.[38] A recent article in the *National Law Journal* describes the end of desegregation orders throughout the country and quotes Orfield, "We're going back to a kind of *Plessy* separate-but-equal world. I blame the courts. Because the courts are responsible for the resegregation of the South."[39]

In addition to resegregation, there is substantial disparity in school funding. A study by the General Accounting Office ("GAO") described the importance of this disparity with respect to myriad factors such as enrollment numbers, availability and number of library books and resources, varying levels of teacher experience, availability of technology and computer resources, and the extent of parental involvement.[40] The study noted that inner city schools were

34. *Id.* at 72.
35. *Id.*
36. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001).
37. Manning v. School Bd. of Hillsborough County, Florida, 244 F.3d 927, 947 (11th Cir. 2001).
38. Marilyn Brown, *Beyond Black and White*, TAMPA TRIB., Feb. 10, 2000, at A-1.
39. Tresa Baldas, *Saying Goodbye to Desegregation Plans*, NAT'L L.J., June 16, 2003, at 4.
40. UNITED STATES GENERAL ACCOUNTING OFFICE, SCHOOL FINANCE: PER-PUPIL SPENDING DIFFERENCES BETWEEN SELECTED INNER CITY AND SUBURBAN SCHOOLS VARIED

typically older than suburban schools, often with higher enrollments of students, and far fewer resources, books, technological support, and lower teacher quality.[41] On average, the study noted that student achievement scores were typically lower in inner city schools than in suburban schools, where there is a greater percentage of less experienced first-year teachers and overall lower teacher quality.[42]

In some cities, the disparities are enormous. For example, the GAO report reveals that in Fort Worth, Texas, the suburban school that spent the least on per-pupil expenditures was still twenty one percent higher than the inner city school that spent the highest amount on per pupil expenditures.[43] Of course, this does not begin to account for the disparity between spending in private schools, predominately attended by wealthier students, and public schools.

By any measure, as America enters the 21st century, public education is separate and unequal. And the problem is getting worse.

II. THE CAUSE: THE LACK OF A UNITARY SYSTEM

My central thesis is that the current inequalities in educational opportunities are a result of the failure to create unitary systems of education, and further court decisions are preventing the creation of a unitary system. By the 1970s, a crucial problem emerged as white flight to suburban areas increased. The flight was due, in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon. The emerging problems further endangered successful desegregation. In virtually every urban area, the inner-city population became increasingly composed of racial minorities. By contrast, the surrounding suburbs were almost exclusively white and the minimal minority population residing in the suburbs is generally concentrated in towns that are almost exclusively black. School district lines parallel town borders, meaning that racial separation of cities and suburbs results in segregated school systems. For example, by 1980, whites constituted less than one-third of the students enrolled in the public schools in Baltimore, Dallas, Detroit, Houston, Los Angeles, Miami, Memphis, New York, and Philadelphia.[44]

BY METROPOLITAN AREA 17 (2002).

41. *Id.*

42. *Id.*

43. *Id.* at 9.

44. Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1005 (1994).

Thus, by the 1970s it was clear that effective school desegregation required interdistrict remedies. There were simply not enough white students in most major cities to achieve desegregation. Likewise, suburban school districts could not be desegregated via interdistrict remedies because of the scarcity of minority students in the suburbs. As Professor Smedley explains:

> Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public school population becomes predominately black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the schools, because there simply are not enough white students left in the city system.[45]

But in *Milliken* in 1974, the Supreme Court imposed a substantial limit on the courts' remedial powers in desegregation cases.[46] A federal district court imposed a multi-district remedy to correct *de jure* segregation in one of the districts.[47] The Supreme Court ruled this impermissible and held that interdistrict remedies required proof of a constitutional violation that produces "significant segregative" effects in other districts.[48] Thus, the Court concluded that there was no constitutional wrong necessitating an interdistrict remedy, unless there was an interdistrict violation and interdistrict effect.[49]

Milliken has had a devastating effect on the ability to achieve desegregation in many areas. In a number of major cities, inner city school systems are substantially black and are surrounded by almost all-white suburbs.[50] Desegregation obviously requires the ability to transfer students between the city and suburban schools. There simply are not enough white students in the city, or enough black students in the suburbs to achieve desegregation without an interdistrict remedy. Yet, *Milliken* precludes an interdistrict remedy unless there is proof of an interdistrict violation. In other words, a multidistrict remedy can be formulated only for those districts whose own policies fostered discrimination, or if a state law caused the interdistrict segregation. Otherwise, the remedy can include only those districts found to have violated the Constitution. Such proof is

45. Theodore Smedley, *Developments in the Law of School Desegregation,* 26 VAND. L. REV. 405, 412 (1973).
46. 418 U.S. at 717.
47. *Id.* at 721.
48. *Id.* at 744-45.
49. *Id.* at 745.
50. *See* Chemerinsky, *supra* note 44, at 1001-03 (illustrating the correlation between disparities in funding and the racial makeup of inner cities and suburbs).

often not available, although there have been some cases where the requirements of *Milliken* have been met.[51]

The segregated pattern in major metropolitan areas, namely blacks in the city and whites in the suburbs, did not occur by accident, but it was rather the product of myriad government policies. Moreover, *Milliken* effectively encouraged white flight to the suburbs. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated. The reality is that in many areas, *Milliken* means no desegregation.

By the 1970s, it was also clear that there were substantial disparities in school funding. In 1972, education expert Christopher Jencks estimated that, on average, each white child received fifteen to twenty percent more in education funding than each black child.[52] This trend continues throughout the country. For example, in the school year 1988-89, the Chicago public schools spent $5,265 for each student's education; but in the Niles school system, just north of the city, $9,371 was spent on each student's schooling.[53] That same year, Camden, New Jersey spent $3,538 on each pupil; but Princeton, New Jersey spent $7,725.[54] These disparities also correspond to race. For example, in Chicago, 45.4% of the students were white and 39.1% were African American; in Niles Township, the schools were 91.6% white and 0.4% black.[55]

There is, of course, a simple explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes. Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at a low rate and still have a great deal to spend on education. Cities must tax at a higher rate and nonetheless have less to spend.

The Court had the opportunity to remedy this inequality in education in *San Antonio Independent School District v. Rodriguez*.[56] But the Court profoundly failed by concluding that the inequalities in

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51. *See, e.g.*, United States v. Bd. of Sch. Comm'rs, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd* in part and *vacated* in part, 637 F.2d 1101 (7th Cir.) (approving interdistrict remedies and finding that the *Milliken* standard for interdistrict relief had been met), *cert. denied*, 449 U.S. 838 (1980); Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976); *see also* Hills v. Gautreaux, 425 U.S. 284 (1976) (approving an interdistrict remedy for housing discrimination).

52. CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 28 (1972).

53. JONATHAN KOZOL, SAVAGE INEQUALITIES 236 (1991).

54. *Id.*

55. Roberta L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 620 n.173 (1993) (citation omitted).

56. 411 U.S. 1 (1973).

funding did not deny equal protection.[57] *Rodriguez* involved a challenge to the Texas system of funding public schools largely through local property taxes.[58] Texas' financing system meant that poor areas had to tax at a high rate, but had little to spend on education. In contrast wealthier areas could tax at low rates, but still maintained more funding for education.[59]

The plaintiffs challenged this system on two grounds: (1) it qualified as impermissible wealth discrimination, thus violating equal protection, and (2) it denied the fundamental right to education. The Court rejected the former argument by holding that poverty is not a suspect classification and that therefore discrimination against the poor need only meet a rational basis review.[60] Moreover, the Court rejected the claim that education is a fundamental right. The Court stated that there must be an assessment as to whether the Constitution explicitly or implicitly guarantees a right to education.[61] Furthermore, the Court stated that it was not its duty to create new substantive rights, nor to assess whether a right to education was as significant or important as the right to subsistence, housing, or travel.[62] Justice Powell, writing for the majority, concluded: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[63]

Although education obviously is inextricably linked to the exercise of constitutional rights such as freedom of speech and voting, the Court nonetheless decided that education is itself not a fundamental right. The Court rejected the appellees' nexus theory, questioning how one would distinguish between an individual's interest in education, and basic human needs such as subsistence and housing.[64] The Court further noted that the government did not completely deny an education to students; rather the petitioners challenged the inequities in funding.[65]

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57. *Id.* at 54-55.
58. *Id.* at 6-8.
59. *Id.* at 12-13 (noting that one impoverished district spent $356 per pupil, while a wealthier district spent $594 per student).
60. *Id.* at 28-29.
61. *Id.* at 33-34.
62. *Id.*
63. *Id.* at 35.
64. See id. at 37 (analogizing an assumption that the "ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.").
65. *Id.* at 38-39.

The Court concluded that strict scrutiny was inappropriate because there was neither discrimination based on a suspect classification nor infringement of a fundamental right.[66] The Court found that the Texas system for funding schools met the rational basis test.[67]

The combined effect of *Milliken* and *Rodriguez* cannot be overstated. *Milliken* helped to ensure racially separate schools, and *Rodriguez* assisted in ensuring that school systems would be unequal. As a result, American public education is characterized by wealthy white suburban schools spending a great deal on education, surrounded by more impoverished black city schools that spend much less on education.[68]

III. CREATING A TRULY UNITARY SYSTEM OF EDUCATION

At this point, there seems neither the political nor the judicial will to deal with the growing segregation and inequalities in American schools. No political candidate is addressing the issue. As explained above, court decisions are causing the problem, not solving it. Therefore, it seems appropriate to begin thinking of new solutions, even if at this point they seem unlikely to ever be implemented. I believe that the only answer to separate and unequal schools is a truly unitary system, where every child, rich and poor, children of color and whites, will receive an education in the same school system.

My proposal is simple, although unrealistic at this point in American history. First, every child must attend public school through high school. There will be no private schools, no parochial schools, and no home schooling. Second, metropolitan school districts will be created for every metropolitan area. In each metropolitan area, there will be equal funding among the schools, except where educational needs dictate otherwise, and efforts will be taken to ensure desegregation. Third, states will ensure equality of spending among metropolitan school districts within their borders.

How could this happen? One possibility would be through the Supreme Court, though of course not with the current Court. The Supreme Court could find that the existing separate and unequal schools deny equal protection for their students, and order the creation of a unitary system as a remedy. Another way to achieve a truly unitary system is by legislative action. Congress could adopt a

66. *Id.* at 40.
67. *Id.*
68. JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 177-83 (2001).

law to achieve these goals or state legislatures could do so within the states' borders.

I do not minimize the radical nature of this proposal, but this may be the only way that equal educational opportunity can be achieved. If wealthy parents must send their children to public schools, then they will ensure adequate funding of those schools. Currently, they have no incentive to care about funding in public schools as long as their children are in private or suburban schools. Moreover, as described above, desegregation can be meaningfully achieved only through metropolitan school systems, which include suburbs and cities, because white students could not flee to private schools.

The most significant objection to this proposal is that it is unconstitutional under current law. In *Pierce v. Society of Sisters*,[69] the Supreme Court held that parents have a fundamental right to send their children to parochial schools. The Court based this on the right of parents to control the upbringing of their children.[70] This right, however, like other fundamental rights, is not absolute. I would argue that strict scrutiny is met and therefore interference with the parents' right to control the upbringing of their children is justified. There is a compelling interest in achieving equality of educational opportunity and the means are necessary because no other alternative is likely to succeed.

Parents desiring religious education for their children would claim a violation of their free exercise of religion. Of course, under the Supreme Court's decision in *Employment Division v. Smith*,[71] such a neutral law of general applicability would not violate the free exercise clause. Also, as explained above, strict scrutiny would be met by the proposal. I do not minimize the interests of parents in providing religious instruction for their children. Parents, however, could still do this through after-school and weekend programs. This is not the same as education where religion permeates instruction, but it does provide a way in which parents can provide religious education for their children.

Perhaps the Court would need to reconsider *Wisconsin v. Yoder*[72] as well, to the extent that it is read as creating a right of parents to isolate their children from the influences of public education.[73] In *Yoder*, the Court held that Amish parents had the right to exempt

69. 268 U.S. 510 (1925).
70. *Id.*
71. *See* 494 U.S. 872 (1990) (stating that a neutral law of general applicability does not violate the free exercise clause).
72. 406 U.S. 205 (1972).
73. *Id.*

their fourteen- and fifteen-year-old children from compulsory school requirements so as to preserve the special Amish culture.[74] Read broadly, parents could invoke *Yoder* to justify a right to home schooling if parents wanted to insulate their children from the influences of public education. Simply put, the courts should hold that the compelling need for equal schooling outweighs this parental right.

Another criticism of this proposal is that it can be circumvented as wealthy parents will provide supplemental classes for their students, after school and on weekends. Certainly, nothing in this proposal limits what occurs outside school hours. But this type of inequality is not a reason to abandon unitary schools. Wealthier children will always have the chance to go to nicer summer camps, better vacations, and to more enrichment classes. However, these other inequalities make it even more important that schools be equal for all.

I have repeatedly emphasized that I do not see this proposal as having the slightest chance of implementation for the foreseeable future. But it does point toward the goal: a unitary system of education for all American children. Even if the proposal is never fully implemented, the goal must be to work toward a unitary system as much as possible. Therefore, measures that move toward a unitary system, such as metropolitan school districts, desegregation orders, and equalization of funding, should be aggressively pursued.

At the same time, efforts that push away from unitary schools should be disfavored. Most notably, voucher systems are undesirable because they are the antithesis of a unitary system. Vouchers encourage parents to send their children to private and parochial schools, and to abandon public schools. For example, under the Cleveland voucher system, parents could use their vouchers only in private and parochial schools.[75] Vouchers will only exacerbate segregation and inequalities in educational opportunity. In large cities, top private schools cost between $15,000-$20,000; a voucher worth $2,500 does not give poor children the ability to attend these schools. Instead, vouchers take money away from the public school, leaving poor children with the choice of attending even worse public schools, lesser private schools, or religious schools subsidized by religions. My central point is that the focus should be on how to

74. *Id.*
75. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

ensure that all children are in the same school system; vouchers have exactly the opposite effect.

CONCLUSION

As *Brown* approaches its fiftieth anniversary, it is easy to be discouraged by the failure to create integrated, equal public schools. All institutions share responsibility. The Supreme Court deserves a great deal of the blame for its decisions precluding metropolitan-wide desegregation efforts and for not finding that disparities in school funding are unconstitutional. Additionally, presidents and Congress also deserve the blame for ignoring the issue for so long.

The underlying problem is that as long as parents can opt out of public schools in cities, by sending their children to private and suburban schools, there can never be desegregation, and there never will be equalization of resources for education. The only solution is to make sure that every child must attend the public schools. Then, and only then, will parents have the incentive to ensure adequate education for all. Put another way, if schools for the poor are regarded as a "welfare program," schools will always be inadequately funded. However, if education is regarded as an insurance program, affecting and benefiting all, then schools' equality will be assured. In this article, I offer the heretical, but essential proposal of eliminating private education and requiring all children to attend metropolitan-area public schools.